Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CITY OF COLUMBUS, GEORGIA, *et al.*,
Petitioners,

VERSUS

STEVE QUETGLES d/b/a BABY DOLLS, *et al.*,
Respondents.

GEORGIA SUPREME COURT CASE NO. S94A0918

CITY OF COLUMBUS, GEORGIA, *et. al.*,
Petitioners,

VERSUS

MICHAEL WELLS, d/b/a AMBER NIGHTS, *et al.*,
Respondents.

GEORGIA SUPREME COURT CASE NO. S94A0927

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Does Columbus, Georgia's Ordinance No. 93-79, which, to use the words of the Georgia Supreme Court, "prohibits private modeling sessions or other sexual displays in one-on-one sessions and close mingling between customers and employees of adult entertainment establishments," infringe upon First Amendment free speech or protected expression?

2.

Even if Columbus, Georgia Ordinance No. 93-79 regulates some form of expressive conduct protected by the First Amendment, must the text of the ordinance be supported, as the Georgia Supreme Court requires, by production of independent evidence, "as to whether the ordinance furthers an important governmental interest which is unrelated to free speech"?

3.

Does Columbus, Georgia's Ordinance No. 93-79 on its face comport with the constitutional principles enunciated in *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), regardless of whether or not the conduct regulated is deemed to be inside or outside the protection of the First Amendment?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Plaintiffs:
1. Michael Wells, d/b/a Amber Nights
2. Steve Quetgles, d/b/a Centerfolds, Baby Dolls and Playmates
3. James Redwine, d/b/a The Doll House
4. Peter Littleton, d/b/a Babes
5. Royce Heard, d/b/a Visual Fantasies
6. Harry Freese, d/b/a For Your Eyes Only
7. Gabriel Gonzalez, d/b/a Gabrielle's

Plaintiffs' Attorneys:
8. Hillard J. Quint
9. Steven M. Youngelson
10. Michael E. Garner

Defendants:
1. City of Columbus, Georgia
2. City Council of Columbus, Georgia
3. Frank D. Chester
4. Frank K. Martin
5. Evelyn W. Turner
6. John J. Rodgers
7. Charles E. McDaniel
8. W. E. Watson
9. Gary Allen
10. Bobby Peters
11. Clay Land
12. A. J. McClung

Defendants' Attorneys:
13. Eugene Hardwick Polleys, Jr., City Attorney
14. Clifton C. Fay, Assistant City Attorney

(Neither the City Attorney nor the Assistant City Attorney has any financial interest in the outcome of the case.)

Judge of trial court:
E. Mullins Whisnant, Chief Judge, Superior Court of Muscogee County, Chattahoochee Judicial Circuit

Justices of Supreme Court of Georgia:
Chief Justice Willis B. Hunt, Jr.
Presiding Justice Robert Benham
Justices Norman S. Fletcher, Leah J. Sears, Carol W. Hunstein, George H. Carley, and Hugh P. Thompson

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

The decision of the Georgia Supreme Court from which Petitioners seek review is reprinted in the appendix and is reported at 264 Ga. 708 and 450 S. E. 2d 677. The decision of the Muscogee County Superior Court granting Petitioners' Motion to Dismiss Respondents' Complaint is also reprinted in the appendix but is not reported.

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PETITION FOR A WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The Supreme Court of Georgia rendered a decision on December 5, 1994 reversing and remanding to the Superior Court of Muscogee County its February 1, 1994 order granting Petitioners' Motion to Dismiss Respondents' Complaint that had made a constitutional challenge to Columbus Ordinance No. 93-79 regulating adult entertainment establishments by prohibiting nude modeling in one-on-one sessions and by prohibiting close mingling between the employees and customers of such businesses. According to the Georgia Supreme Court, the City's ordinance could not on its face withstand scrutiny under the First Amendment and could thus be justified only upon factual proof that it met a tripartite test established in *Paramount Pictures v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982): "The constitutionality of a law regulating adult entertainment will be upheld only (1) if it furthers an important governmental interest; (2) if that governmental interest is unrelated to the suppression of speech; and, (3) if the incidental restriction of speech is no greater than is essential to the furtherance of that governmental interest."

No rehearing was sought by the City because the issues had been thoroughly briefed, the adoption in the concurring opinion of a number of authorities cited by the City indicated that the City's points had been noted, and the unanimity of the end result made it unlikely that any change could be persuaded. Furthermore, the First Amendment issue is clear and unmuddled by any collateral issues, and jurisdiction for review is obviously bestowed by 28 U.S.C. § 1257.

On all three of the stated questions presented for review the decision of the Georgia Supreme Court is in direct conflict with *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). The Columbus ordinance regulates conduct that is even further

removed from First Amendment protection than the nude dancing regulated by the Indiana statute, and the governmental interest in preventing sexual crimes by prohibiting one-on-one nude modeling behind closed doors or physical contact between nude models and customers is even more obvious than the spectator activities regulated by Indiana. The concurrence by five justices sitting on the current United States Supreme Court that no statement of legislative purpose or evidentiary supplementation is required to sustain an Indiana law on adult entertainment in the face of a First Amendment challenge renders the interpretation of the United States Constitution by the Georgia Supreme Court plainly erroneous.

The Georgia Supreme Court has rendered a decision in conflict with the following state courts of last resort that have reached contrary conclusions on the issues presented for review: *City of New Orleans v. Kiefer*, 246 La. 305, 164 So.2d 336 (6) (1964); *City of Portland v. Derrington*, 451 P.2d 111 (4) (Supreme Court of Oregon 1969) *cert. den.* 396 U.S. 901; *Hoffman v. Carson*, 250 So.2d 891 (4) (Supreme Court of Florida 1971) dismissed for want of substantial federal question, 404 U.S. 981; *Robinson v. State*, 459 S.W.2d 503 (1) (Supreme Court of Arkansas 1973); *City of Seattle v. Marshall*, 83 Wash. 2d 665, 521 P.2d 693 (4) (1974), *cert. den.*, 419 U.S. 1023; *Aristocratic Restaurant of Massachusetts v. Alcoholic Beverages Control Commission* (No.1), 374 N.E. 2d 1181 (6) (Supreme Judicial Court of Massachusetts 1978), dismissed for want of substantial federal question, 439 U.S. 803; *7250 Corporation v. Board of County Commissioners for Adams County*, 799 P.2d 917 (3) (Supreme Court of Colorado 1990); *City of Lincoln v. ABC Books*, 238 Neb. 378, 470 N.W.2d 760 (9) (1991).

The Georgia Supreme Court has rendered a decision in conflict with the following United States courts of appeals that

have reached contrary conclusions on the issues presented for review: *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243 (3) (9th Cir. 1982); *Wall Distributors v. City of Newport News, Virginia*, 782 F.2d 1165 (6) (7) (4th Cir. 1986); *Berg v. Health and Hospital Corporation of Marion County, Indiana*, 865 F.2d 797 (1) (7th Cir. 1989); *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (4) (8th Cir. 1990); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 10 F.3d 123 (10) (28) (3rd Cir. 1993).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED IN THE CASE

1. First Amendment:
   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

2. Columbus Ordinance No. 93-79: text set out in the appendix.

STATEMENT OF THE CASE

The Columbus ordinance contains no preamble expressing any legislative purpose or rationale for its enactment, but such statements would have made no difference because the Georgia Supreme Court, in *Discotheque, Inc. v. City Council of Augusta, Georgia*, 254 Ga. 623, 624, 449 S.E.2d 608 (1994), on November 15, 1994, dismissed such legislative language as "merely self-serving conclusory hearsay" and, accordingly, reversed the Richmond County Superior Court's grant of summary judgment that had upheld an Augusta ordinance regulating nude dancing at alcoholic beverage establishments

without requiring any probative evidence. The concurring opinion of two of the justices in the case at bar, who, having had the benefit two to three weeks of further reflection in the Columbus case, concluded that they had wrongly decided the Augusta case. Two more concurring justices would require not only evidentiary proof to sustain all adult entertainment ordinances in court but also factual findings by the legislative body before it is even allowed to enact such ordinances.

The First Amendment issues were raised by the Complaint and Answer and Motion to Dismiss and by briefs supporting both sets of parties to the litigation in the Superior Court of Muscogee County. The Muscogee Superior Court's grant of the City's Motion to Dismiss denied all constitutional claims of the adult entertainment establishments, and the reversal and remand of the case by the Georgia Supreme Court to the Muscogee Superior Court specifically predicates its holding on the First Amendment.

Columbus Ordinance No. 93-79 is thus submitted to the United States Supreme Court on its face, and its validity depends upon the First Amendment.

ARGUMENT AND AUTHORITIES

1. FAILURE OF GEORGIA SUPREME COURT TO FOLLOW *BARNES V. GLEN THEATRE*, 501 U.S. 560 (1991)

The most egregious error of the Georgia Supreme Court is its failure to follow *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). Not only does the Georgia Supreme Court elevate all adult entertainment to a higher status under the First Amendment than *Barnes* allows, but it also ignores the inescapable mandate from *Barnes* that governments do not have to justify by factual proof their legislative decisions to regulate or pro-

hibit certain activities in businesses that thrive upon sexual exhibitionism. The Georgia Supreme Court has plainly interpreted and applied the First Amendment contrary to the constitutional principles expressed in all of the three opinions constituting the *Barnes* majority.

If the State of Indiana can regulate or prohibit nude dancing by a statute that is valid on its face, then the City of Columbus should be able to regulate or prohibit the nudity behind closed doors and the mingling between customers and nude employees that characterize the adult entertainment establishments that are subject to the ordinance submitted by this Petition. If Indiana nude dancing is only on "the outer perimeters of the First Amendment" as the opinion of the Chief Justice for the Court suggests (111 S.Ct. 2456, 2460), then, surely, the one-on-one nude exhibitions and the nude mingling prohibited by the Columbus ordinance are also on the fringe and, as Justice Scalia suggests in his concurrence (111 S.Ct. 2456, 2463), probably are not even within the boundaries of the First Amendment at all. If the Indiana public indecency statute that requires dancers to wear "pasties" and a "G-string" is justified despite its incidental limitations on some expressive activity (111 S.Ct. 2456, 2461), then, surely, the Columbus ordinance has no more adverse impact upon the Constitution when it prohibits such activity in private rooms reserved for each patron or when it prevents physical contact. If it is possible to discern from the text of the Indiana statute and from its history "what governmental interest the Indiana legislators had in mind" (111 S.Ct. 2456, 2461), then, surely, what the Columbus Councilors had in mind when they enacted Columbus Ordinance No. 93-79 is also a self-evident truth with little imagination and no proof being required to conclude that a city or county government has an interest in regulating or preventing intimate commercial activity that fosters sex-related offenses. If, on its face, the Indiana statute

"furthers a substantial government interest in protecting order and morality" and this interest "is unrelated to the suppression of free expression" (111 S.Ct. 2456, 2462), then, surely, the Columbus ordinance rests upon a similar sound constitutional foundation.

2. STATE COURTS OF LAST RESORT THAT ALLOW RESTRICTIONS ON ADULT ENTERTAINMENT COMPARABLE TO COLUMBUS ORDINANCE NO. 93-79 UNDER FIRST AMENDMENT

The Columbus ordinance is not predicated on the power to regulate alcohol that is vested in the States by the Twenty-first Amendment, and this Petition is addressed to the Supreme Court purely on the power of the City to control adult entertainment under its police power in light of the First Amendment. Accordingly, Petitioners submit the following cases where decisions have been rendered by state courts of last resort that result in a different meaning for the First Amendment outside of Georgia. Petitioners believe that the presence of alcohol in some of the cases is only incidental to the holdings reached under the First Amendment, for none of the opinions offer the Twenty-first Amendment as authority for reaching the conclusions quoted below from the identified syllabi:

(a) *City of New Orleans v. Kiefer,* 246 La. 305, 164 So.2d 336 (6) (1964): "The ordinance prohibiting female entertainer or performer or female employee in on-sale liquor establishment having strip-tease or burlesque performances from mingling with patrons does not impair freedom of speech."

(b) *City of Portland v. Derrington*, 451 P.2d 111 (4) (Supreme Court of Oregon 1969), *cert. den.*, 396 U.S. 901: "City ordinance making it unlawful for any female to appear in place where food or alcoholic beverage is offered for sale for consumption on premises so costumed or dressed that one or both of her breasts are wholly or substantially exposed did not offend free speech amendment to Federal Constitution."

(c) *Hoffman v. Carson*, 250 So.2d 891 (4) (Supreme Court of Florida 1971), dismissed for want of substantial federal question, 404 U.S. 981: "Statute relating to exposure of sexual organs was directed at conduct and not speech and was not invalid as applied to 'go-go' dancer in public lounge who claimed her performance constituted interpretation of music and communication of her ideas of freedom to patrons but who admitted she was usually tipped a certain amount for removing her brassiere and additional sum for removing her pants."

(d) *Robinson v. State*, 459 S.W.2d 503 (1) (Supreme Court of Arkansas 1973): "Arrest of female performers, without prior adversary hearing, after performers danced on stage clad only in 'briefs' covering the lower part of their bodies did not constitute a prior restraint on the exercise of freedom of expression, and the painting of the performers' breasts by a male participant using fluorescent paint added nothing to 'freedom of expression.'"

(e) *City of Seattle v. Marshall,* 83 Wash. 2d 665, 521 P.2d 693 (4) (1974), *cert. den.*, 419 U.S. 1023: "Stage performance in which female performers exposed their private parts to an all male, adult audience was not protected by the First Amendment where performance was devoid of any plot and had no purpose whatsoever than to appeal to sex-oriented prurient interests of an adult, male audience."

(f) *Aristocratic Restaurant of Massachusetts v. Alcoholic Beverages Control Commission* (No.1), 374 N.E.2d 1181 (6) (Supreme Judicial Court of Massachusetts 1978), dismissed for want of substantial federal question, 439 U.S. 803: "Regulation prohibiting entertainers from mingling with patrons in liquor establishments did not violate any right of freedom of speech or assembly under First Amendment."

(g) *7250 Corporation v. Board of County Commissioners for Adams County,* 799 P.2d 917 (3) (Supreme Court of Colorado 1990): "County ordinance imposing time and place limitations on nude dancing establishments which did not have liquor licenses, did not violate first amendment rights of owners; county board issuing ordinance had constitutional power to do so, ordinance served substantial government interest in preserving character and quality of residential neighborhoods, ordinance was content neutral as it did not regulate manner of dancing, and restrictions on operations within specified distance of residential areas, restriction on hours of operation more severe than

those for liquor establishments, and imposition of minimum age requirements were no more restrictive than necessary to advance legitimate legislative interests."

(h) *City of Lincoln v. ABC Books*, 238 Neb. 378, 470 N.W.2d 760 (9) (1991): "Municipal ordinance governing interior visibility of viewing booths in picture arcades did not restrict viewing of any forms of entertainment or grant officials discretion to suppress any speech based upon its content and, thus, was not prior restraint; ordinance did not restrain arcade from selling to its patrons whatever books, films videotapes, or other forms of entertainment it wished, provided it complied with ordinance."

3. CONTRARY FIRST AMENDMENT JURISPRUDENCE IN UNITED STATES COURTS OF APPEALS THAT ALLOW OPEN BOOTH REQUIREMENTS IN SEXUALLY ORIENTED BUSINESSES AND THAT RECOGNIZE LEGISLATIVE FINDINGS OF FACT

The results reached by United States Courts of Appeals in five separate circuits show a direct conflict between the views of the First Amendment in the federal system and in Georgia. Since the Columbus ordinance attempts to minimize illicit sexual activity by prohibiting viewing of living nudity in intimate settings and in prohibiting mingling between nudes and customers, the closed booth prohibitions on sexual entertainment upheld by federal courts in other jurisdictions provide appropriate analogies to the Columbus situation; however, except for the recognition of such authority by two justices in

one of the two concurring opinions (who, nevertheless, declined, in reviewing both the Augusta and the Columbus ordinances, to follow such authority), the Georgia Supreme Court plows its own divergent furrow through the field of federal constitutional law. Furthermore, the Georgia Supreme Court requires the City of Columbus and the City of Augusta and every other political subdivision in Georgia to prove in court what ought to be a matter of judicial notice of significant governmental interests as has been acknowledged by the following decisions:

(a) *Ellwest Stereo Theatres v. Wenner,* 681 F.2d 1243 (3) (9th Cir. 1982): "City ordinance requiring that viewing areas of booths in which coin operated viewing devices are located be visible from a continuous aisle is not unconstitutional on its face as violative of free speech provision of Constitution in that ordinance is aimed at curtailing public sexual criminal offenses and as such clearly seeks to further significant state interests."

(b) *Wall Distributors v. City of Newport News, Virginia,* 782 F.2d 1165 (6) (7) (4th Cir. 1986):
(6) "Ordinance making it a criminal offense to exhibit films in enclosed booths was valid restriction on manner of speech."
(7) "To sustain legislative determination of important or substantial governmental interest against constitutional attack, legislature is not bound to create evidentiary record that would pass muster on plenary judicial review of legislation's necessity and fitness to achieve desired results; judicial review goes only to whether legislative determination of justification and fitness is not

facially without factual support, hence not arbitrary and capricious."

(c) *Berg v. Health and Hospital Corporation of Marion County, Indiana*, 865 F.2d 797 (1) (7th Cir. 1989): "Ordinance designed to decrease spread of 'acquired immune deficiency syndrome (AIDS)' by regulating doors on individual entertainment enclosures was not prior restraint of speech prohibited by First Amendment; the ordinance did not ban viewing any forms of entertainment or grant officials discretion to suppress any speech based upon content, but merely regulated environment in which viewing of entertainment occurred, and the ordinance did not require obtaining of license or permit before exhibiting any particular form of speech."

(d) *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (4) (8th Cir. 1990): "Municipal ordinance regulating movie arcades with viewing areas designed for occupancy by fewer than six persons, which required all such viewing areas to be visible from continuous main aisle, was content neutral and valid manner restriction on protected speech; city, which claimed to be motivated by health and safety issues was not required to conduct its own independent investigation of all health issues, but instead could rely on actions and findings of other governmental bodies."

(e) *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 10 F.3d 123 (10) (28) (3rd Cir. 1993):

(10) "Statute limiting hours of adult entertainment center was content-neutral, for purposes of determining whether it violated First Amendment, even though it was claimed that state had not produced sufficient evidence that alleged secondary problems connected with operation of adult entertainment business, such as traffic congestion, parking problems, performance of sexual acts in public, and littering of discarded sexually explicit materials, actually existed; time, place and manner regulation of such businesses could be supported by studies from other localities, and did not require separate study or independent evidence."

(28) "Statute requiring that adult entertainment establishments have one side of viewing booths open to public room satisfied requirement, for imposing restriction upon constitutionally protected speech, that alternative channels of communication be left open; there was no restriction whatsoever on types of materials which patron of establishment could view in booth."

CONCLUSION

Petitioners depart by citing three thoughtful and comprehensive cases that illustrate why this Petition for a Writ of Certiorari should be granted. *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, 32 Cal.3d 553, 186 Cal.Rptr. 494, 652 P.2d 51 (Supreme Court of California 1982), illustrates the debates in state courts of last resort as to what the First Amendment means in the field of

public commercial nudity in light of decisions of the United States Supreme Court. *Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), illustrates the continuation of such discussions in United States courts of appeals even after the considerable enlightenment emanating from *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). *Cafe 207 v. St. Johns County*, 856 F.Supp. 641 (M.D. Florida 1994), illustrates how the case at bar should be decided and what should be adopted as the law of the land.

Morris v. Municipal Court overruled *Crownover v. Musick*, 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497 (Supreme Court of California 1973), *cert. den.*, 415 U.S. 931; in its own day, *Crownover* had overruled *In re Giannini*, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (Supreme Court of California 1968), *cert. den.*, 395 U.S. 910. This California saga of topless or bottomless waitresses or entertainers has in each chapter of its evolution produced learned majority and dissenting opinions. Suffice it to say for purposes of this Petition, that the opposite views of reasonable state justices on the question of morality and nudity and the First Amendment expressed in *Morris* deserve to be revisited by the United States Supreme Court:

1. Majority opinion (652 P.2d 51, 59): "The county argues that its interest in 'the promotion of public morals' is sufficiently substantial to uphold the ordinance. While undoubtedly the desire to control what may be viewed as immoral behavior is one of the reasons, often inarticulated, for the passage of most ordinances such as the one at issue here, *Schad* and *Doran* demonstrate that it is insufficient."

2. Dissenting opinion (652 P.2d 51, 67): "As we noted in *Crownover*, nude dancing within this context is a pure commercial 'sales gimmick.' If substantial numbers of the citizenry, additionally, find the conduct cheapening, demeaning and degrading to women the Santa Clara County Board of Supervisors, in my view, surely may consider these factors when, as a policy matter, it weighs considerations of public morality and the general welfare against some ethereal constitutional right to dance naked."

Triplett Grille v. City of Akron analyzed an Akron public indecency ordinance in light of *Barnes v. Glen Theatre* and concluded that the ordinance properly forbids nude dancing in adult entertainment establishments and the City did not bear any burden of proving adverse secondary effects to sustain the ordinance because it is "virtually identical to the Indiana statute considered in *Barnes*"; nevertheless, the ordinance was ruled facially invalid for overbreadth because "the City had failed to demonstrate a link between nudity in non-adult entertainment and secondary effects." 40 F.3d 129, 135. In arriving at these results, the Court of Appeals noted that it faced "the vexing task of divining which of the varied standards enunciated in *Barnes* is the law of the land." 40 F.3d 129, 133. Was the law of the land expressed by the Chief Justice, joined by Justices O'Connor and Kennedy, to the effect that morality constituted a proper governmental interest justifying a bar on nude dancing? Obviously, Justice Scalia agreed that morality constituted a proper reason for banning nude dancing that was not even protected at all by the First Amendment, but what about Justice Souter? When Justice Souter wrote separately in concurring and articulated the adverse secondary effects of nude dancing as the proper foundation for regulating or banning such activity, would he also have

agreed that morality is a proper foundation? Since the Court of Appeals did not want to second-guess Justice Souter and since five of the justices appeared to agree on Justice Souter's secondary effects justification, Justice Souter's opinion, expressing the narrowest possible ground for the holding, undoubtedly could be deemed the law of the land; but morality would have to wait for another day in court. The City of Columbus submits its ordinance on both the secondary effects theory and on the morality theory and hopes that the Supreme Court will now muster five or more votes and make morality the law of the land.

Cafe 207 v. St. Johns County upheld an ordinance containing more extensive proscriptions on nudity than the Columbus ordinance; it sums up and decides correctly the major issues raised in this Petition for Certiorari. The St. Johns County ordinance banned nudity in public places and was challenged by a cafe that provides live nude entertainment and serves no alcohol. The District Court ruled that the ordinance constitutes a proper exercise of the police power and "serves a substantial and important governmental interest in protecting order and morality *and* in combating the secondary effects of nudity in adult entertainment establishments." 856 F.Supp. 641, 644. The District Court decided the case in favor of the County on summary judgment; found that no trial was necessary or even authorized under *United States v. O'Brien*, 391 U.S. 367 (1968), to inquire into legislative motives; and recognized that "secondary effects of proscribed conduct may be taken into consideration by a court in evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law." 856 F.Supp. 641, 645. In Footnote 4, on the same page, the

District Court points out a serious problem similar to the problem created by the Georgia Supreme Court's imposition of a burden of proof upon governing authorities seeking to enact regulations on adult entertainment:

> To permit legislators — or those, like county commissioners, exercising legislative authority — to be subject in litigation to examination about their individual motives in voting or not voting for particular measures would pose serious constitutional questions concerning separation of powers and would undermine the policy considerations supporting the doctrine of legislative privilege and immunity. *Palmer v. Thompson*, 403 U.S. 217, 225-226, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268, 97 S.Ct. 555, 565, 50 L.Ed.2d 450 (1977). Cases such as *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir.1993) and *Jager v. Douglas County School District*, 862 F.2d 824 (11th cir. 1989), cert. denied, 490 U.S. 1090, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989), which do examine legislative motivation, were decided under the Establishment Clause of the First Amendment, and are clearly distinguishable for that reason.

Respectfully submitted,

Eugene Hardwick Polleys, Jr.
City Attorney
P.O. Box 1340
Columbus, Georgia 31993
(706) 571-4721 or 4722
GA STATE BAR NO. 583000
ATTORNEY FOR PETITIONERS

February 28, 1995

APPENDIX A

C.A.09-01-93(8)
C.A.09-14-93(6)
93-79

AN ORDINANCE
No. 93-79

An Ordinance regulating adult entertainment establishments.

THE COUNCIL OF COLUMBUS, GEORGIA HEREBY ORDAINS:

SECTION 1.

After the effective date of this ordinance it shall be unlawful to locate any adult entertainment establishments on sites prohibited by this ordinance.

SECTION 2.

It shall be unlawful for adult entertainment establishments either existing at the time of the enactment of this ordinance or established thereafter to be operated in violation of this ordinance.

SECTION 3.

Adult entertainment establishments are defined as businesses in which, as the major activity, customers congregate primarily for the purpose of viewing or associating with employees who display anatomical areas designed to provide sexual stimulation or sexual gratification: human genitals, the immediate pubic region, or pubic hair; buttocks to the extent of exposing the immediate anal area; female breasts to points below the nipples; male genitals in a state of erection, even if covered with opaque clothing; all of the above anatomical areas when covered only by transparent or diaphanous clothing.

SECTION 4.

All businesses engaging in activities defined by the term ' adult entertainment establishment'' shall so identify themselves when applying for licenses or permits or certificates from any division or department of the Consolidated Government, and no such license or permit or certificate shall be issued unless the premises and the persons owning or operating the businesses comply with the criteria in this ordinance; however, any such business located on a site that was not prohibited prior to the enactment of this ordinance may renew but not transfer its license to operate.

SECTION 5.

In addition to all other requirements for doing business in Columbus, Georgia, adult entertainment establishments and all employees thereof shall be required to apply for and obtain a permit from the Chief of Police certifying compliance with this ordinance.

SECTION 6.

No adult entertainment establishment shall be located within 600 feet of the property line of any church, school, community teen center, library, nursery school, day care center, playground, residential zone, or condominiums and multiple-family dwellings and townhouses located in A-O zones.

SECTION 7.

No person shall own, manage, operate in any manner or be employed in any capacity by an adult entertainment establishment who has been convicted of or pled guilty or nolo contendere to any federal or state felony within five years of applying for the permit from the Chief of Police necessary to do business or to be employed, nor shall any such person who

has been convicted of or pled guilty or nolo contendere to any federal or state misdemeanor involving moral turpitude within two years of such application be issued such a permit.

SECTION 8.

No adult entertainment establishment shall allow and no employee thereof shall engage in private modeling sessions or other activities involving sexual displays in which one employee is placed in a one-on-one situation with one customer, and a regular show area with open seating shall be required for such sessions or displays; neither shall any adult entertainment establishment or any employee thereof allow personal physical contact or close mingling between customers and employees.

SECTION 9.

All adult entertainment establishments are prohibited during regular business hours from admitting minors as defined by O.C.G.A. § 39-1-1.

SECTION 10.

The Chief of police is empowered to recommend the revocation of the license of any adult entertainment establishment in which the owner is convicted of or pleads guilty or nolo contendere to any provisions of this ordinance or any federal or state felony or any federal or state misdemeanor involving moral turpitude, and the Chief of Police is empowered to recommend the revocation of the license of any adult entertainment establishment in which a manager or any employee (or employees) in two or more separate incidents on separate occasions is convicted of or enters pleas of guilty or nolo contendere to any such violation.

SECTION 11.

The procedures for revocation shall be the same as the procedure required by Columbus Code Section 3-11(b).

Introduced at a meeting of the Council of Columbus, Georgia, held on the 7th day of September, 1993, introduced a second time at a regular meeting of said Council held on the 14th day of September, 1993, and adopted at said meeting by the affirmative vote of eight members of said Council.

Councilor Allen voting YES.
Councilor Batastini voting NO.
Councilor Chester voting YES.
Councilor Land voting YES.
Councilor McClung voting YES.
Councilor McDaniel voting YES.
Councilor Peters voting YES.
Councilor Rodgers voting YES.
Councilor Turner voting YES.
Councilor Watson voting ABSENT.

/s/ LEMUEL H. MILLER, JR.	/s/ FRANK K. MARTIN
LEMUEL H. MILLER, JR. CLERK	FRANK K. MARTIN MAYOR

This ordinance submitted to the Mayor, for his signature, this the 14th day of Sept., 1993
Sec: 3-202(1)
/s/Lemuel H. Miller Jr.
Clerk of Council

This ordinance received, signed by the Mayor, at 10:00 A.M. on the 15th day of Sept. 1993, and becomes law ten days after said time received and becomes effective at 12:00 noon the following day.
Sec: 3-202 (2) /s/ Lemuel H. Miller, Jr
Clerk of Council

APPENDIX B

GEORGIA
MUSCOGEE COUNTY
CLERK'S OFFICE
SUPERIOR COURT
FILED IN OFFICE
FEB 1 1994
At 1135
BW
CLERK
SUPERIOR COURT

IN THE SUPERIOR COURT
OF MUSCOGEE COUNTY

STATE OF GEORGIA

CIVIL ACTION
FILE NO. SU 93 CV 3588

MICHAEL WELLS, d/b/a AMBER NIGHTS, STEVE QUETGLES, d/b/a BABY DOLLS, STEVE QUETGLES, d/b/a PLAYMATES, STEVE QUETGLES, d/b/a CENTERFOLDS, JAMES REDWINE, d/b/a THE DOLL HOUSE, PETER LITTLETON, d/b/a BABES, ROYCE HEARD, d/b/a VISUAL FANTASIES, HARRY FREESE, d/b/a FOR YOUR EYES ALONE and GABRIEL GONZALEZ d/b/a GABRIELLE'S,

Plaintiffs,

v.

CITY OF COLUMBUS, GEORGIA, THE CITY COUNCIL OF COLUMBUS, GEORGIA, FRANK D. CHESTER, individually and in his capacity as Chairman of the City Council of Columbus, Georgia, FRANK K. MARTIN, Mayor, EVELYN W. TURNER, JOHN J. RODGERS, CHAS E. McDANIEL, W. E. WATSON, GARY ALLEN, BOBBY PETERS, CLAY LAND and A.J. McCLUNG, individually and in their capacity as members of the City Council of Columbus, Georgia,

Defendants.

ORDER

Defendants filed a Motion to Dismiss the above styled action on September 23, 1993. In its Motion to Dismiss Defend-

ants' contend that Plaintiffs fail to state a claim against the Defendants upon which relief can be granted, and that the ordinance on its face constitutes a valid exercise of the City's police power which is not prohibited by any of the constitutional provisions as contended by the Plaintiffs.

The Court now finds that the Plaintiffs failed to state a claim against the Defendants upon which relief can be granted. Therefore, the motion to dismiss the Plaintiff's Complaint is granted.

Accordingly, it is ORDERED AND ADJUDGED, that Defendant's motion to Dismiss Plaintiff's Complaint is granted. This 1st day of Feb., 1994.

/s/ E. Mullins Whisnant,

E. Mullins Whisnant, Judge
Muscogee County Superior Court

APPENDIX C

In the Supreme Court of Georgia

Decided: DEC 5 1994

S94A0918. QUETGLES et al. v. CITY OF COLUMBUS et al.

S94A0927. WELLS et al. v. CITY OF COLUMBUS et al.

CARLEY, Justice.

Appellee-defendant City of Columbus (City) adopted an ordinance which prohibits private modeling sessions or other sexual displays in one-on-one sessions and close mingling between customers and employees of adult entertainment establishments. Appellant-plaintiffs brought suit challenging the constitutionality of the ordinance. The trial court granted the City's motion to dismiss for failure to state a claim and appellants appeal.

A legislative restriction on adult entertainment must satisfy a tripartite test in order to comport with the free speech guarantees of the federal and state constitutions. *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 703 (1)(c) (386 SE2d 140) (1989). The constitutionality of a law regulating adult entertainment will be upheld only (1) if it furthers an important governmental interest; (2) if that governmental interest is unrelated to the suppression of speech; and, (3) if the incidental restriction of speech is no greater than is essential to the furtherance of that governmental interest. *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 256 (297 SE2d 250) (1982).

On the City's motion to dismiss under OCGA § 9-11-12(b)(6), appellants' pleadings must be construed most favorably for them and all doubt resolved in their favor. *Alford*

v. PSC, 262 Ga. 386, fn. 1 (418 SE2d 13) (1992). Applying that standard, appellants' pleadings raise a justiciable issue as to whether the ordinance furthers an important governmental interest which is unrelated to free speech. In support of its motion to dismiss, the City produced no evidence showing that the ordinance furthers such an important governmental interest. In *Discotheque, Inc. v. City Council of Augusta, Ga.*, __ Ga. __ (Case Number S94A1508, decided November 15, 1994), we held that it was error to grant summary judgment upholding the constitutionality of an ordinance regulating adult entertainment in the absence of such evidence. Accordingly, the grant of the City's motion to dismiss for failure to state a claim must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Judment reversed and case remanded. All the Justices concur.

S94A0918. QUETGLES et al. v. CITY OF COLUMBUS et al.

S94A0927. WELLS et al. v. CITY OF COLUMBUS et al.

FLETCHER, Justice, concurring.

I concur in the judgment because of this court's decision in *Discotheque, Inc. v. City Council of Augusta*, 1994 Ga. Lexis 885 (Ga. Sup. Ct. S94A1508, decided November 15, 1994). Since that case requires a city to present more evidence of a content-neutral purpose than the ordinance's preamble, the Columbus ordinance did not have even a preamble explaining the city's reasons for passing the ordinance, and the City of Columbus moved to dismiss the complaint without producing any evidence, I agree that Baby Dolls states a claim for which relief may be granted.

1. Although I was part of the unanimous court in *Discotheque*, I now believe that this court made a mistake in reversing the judgment in favor of the City of Augusta. Rather than concluding that the preamble to the Augusta ordinance was "self-serving conclusory hearsay" that would not support summary judgment, I would now hold that the preamble was sufficient evidence to show that the city had an important goverment interest unrelated to the suppression of speech in passing the ordinance.[1] All the United States Supreme Court requires is

[1]The preamble to Augusta's ordinance in that case stated the following:

> *Section 1. Findings; Public Purpose.* Based on the experience of other urban counties and municipalities, including, but not limited to Richmond County, Georgia; Atlanta and Fulton County, Georgia; DeKalb County, Georgia; and Ft. Lauderdale and Palm Beach, Florida, which experiences we believe are relevant to the problems faced by City of Augusta, Georgia, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities

that a city rely on evidence that "is reasonably believed to be relevant to the problem that the city addresses." See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (106 SC 925, 89 LE2d 29) (1986). Based on the theory of "legislative notice," a city council may rely on the findings and experiences of other governmental bodies in enacting ordinances regulating adult entertainment establishments.[2] Since

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> within our country. Moreover, it is the finding of the City Council of Augusta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the acts of criminal behavior identified with nudity and alcohol are disorderly conduct, prostitution, and drug trafficking and use. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.
>
> Ordinance No. 5643.

[2]See *Postscript Enterprises v. City of Bridgeton*, 905 F2d 223 (8th Cir. 1990) (upholding ordinance eliminating closed viewing booths in movie arcade based solely on the ordinance's introductory "whereas" clauses); see also *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F3d 123, 141-43 (3d Cir. 1993) (relying in part on doctrine of legislative notice to conclude the Delaware legislature had an adequate basis for enacting an open-booth requirement in adult entertainment establishments); *Wall Distributors, Inc. v. City of Newport News*, 782 F2d 1165, 1169-70 & n.7 (4th Cir. 1986) ("legislative notice of facts must be deemed to run at least as wide as does judicial notice").

the concerns expressed in the preamble to the Augusta ordinance are not arbitrary, irrational or speculative and the predominate reason for its passage was the reduction of adverse secondary effects, I now conclude that the Augusta ordinance was a reasonable time, place, and manner restriction on the protected expression of barroom nude dancing.

2. Because of the procedural posture of this case, our decision today reversing the judgment in favor of the City of Columbus does not address the constitutionality of the regulation banning private booths in lingerie modeling studios. State, cities, and counties may prohibit closed booths in sexually oriented businesses, whether they are video arcades, adult bookstores, or lingerie modeling studios, as a reasonable manner regulation on free speech. "[A]ll federal courts that have addressed this issue have unanimously upheld the open-booth requirement as a valid exercise of state police powers." See *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F3d 123, 143 (3d Cir. 1993) (listing eleven cases from six courts of appeal); see also *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378 (470 NW2d 760) (1991) (upholding the constitutionality of ordinance that prohibited enclosed or concealed booths in picture arcades). The government can eliminate closed booths based on its interest in reducing crime, preventing public sexual activity, maintaining public health, and protecting adjacent properties from deterioration.[3]

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[3]See, e.g., *Wall Distributors*, 782 F2d at 1169 (open-booth regulation designed to promote public welfare by preventing crime and maintaining sanitary conditions); *Berg v. Health and Hospital Corp.*, 865 F2d 797 (7th Cir. 1989) (open-booth ordinance designed to help prevent or slow the spread of AIDS by eliminating structures where high-risk sexual activity occurs); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F2d 1243 (9th Cir. 1982) (open booth requirement aimed at curtailing public sexual criminal offenses).

3. Nor does the court's decision today address what type of evidence is required in a summary judgment proceeding and whether the evidence must have been presented to the legislative body when enacting the ordinance. The safer position for cities and counties that wish to adopt constitutional regulations is to assume that the governing body must have some evidence of the relationship between the proposed regulation of adult entertainment establishments and the asserted government interest at the time of enactment.

> The decision to enact such a regulation constitutes a legislative determination that closed booth showings produce side effects that are destructive of public health, decency and order. To have this determination sustained against constitutional attack, a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of legislation's necessity and fitness to achieve desired results. Judicial review goes only to whether the legislative determinatin of justification and fitness is not facially without factual support, hence not arbitrary and capricious.

Wall Distributors, Inc. v. City of Newport News, 782 F2d 1165, 1169 (4th Cir. 1986). Thus, courts have concluded that statements of citizens and government officials; correspondence from citizens' associations, council members, and a state's attorney; and untranscribed testimony at public hearings and meetings about the adverse effects of adult bookstores was sufficient evidence of secondary effects under *Renton* to withstand a constitutional challenge to the ordinance.[4] Given

[4]See *11126 Baltimore Blvd. v. Prince George's County*, 886 F2d 1415, 1418 (4th Cir. 1989), vacated on other grounds, 496 U.S. 901 (110 SC 2580, 110 LE2d 261) (1990); see also *Doe v. City of Minneapolis*, 898 F2d 612, 615-16 (8th Circuit 1990) (relying on affidavits by city law enforcement officers, statements of support by state health officials, scien-

the role of judicial review in these cases, I do not think that this court need adopt any more stringent standard on the sufficiency of the evidence than required by other courts in reviewing open-booth requirements.

I am authorized to state that Justice Hunstein joins in this concurrence.

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tific articles on the spread of the AIDs virus, and affidavits submitted by Indiana officials to support city's decision to reduce high risk sexual conduct and the resulting spread of the AIDS virus by removing doors from viewing booths in adult bookstores).

S94A0918. QUETGLES et al. v. CITY OF COLUMBUS et al.

S94A0927. WELLS et al. v. CITY OF COLUMBUS et al.

SEARS, Justice, concurring.

I agree with the majority that the trial court's judgment must be reversed. I write to emphasize two points. First, the majority opinion does not address several issues raised by the appellants that do not relate to the First Amendment issue on which the Court reverses. As to those issues, the Court's silence does not amount to an affirmance of the trial court's ruling on them. Instead, by reversing the grant of the motion to dismiss, the appellant's complaint is reinstated in its entirety.

Second, with regard to the City of Columbus's burden to produce evidence of secondary effects of appellants' adult entertainment establishments, I write to emphasize that for the city's ordinance to pass constitutional muster the city must have relied on that evidence "in passing the municipal ordinance." *Discotheque, Inc. v. City Council of Augusta*, 1994 Ga. Lexis 885 (Ga. Sup. Ct. S94A1508, decided November 15, 1994) (slip op. at 4).

I am authorized to state that Chief Justice Hunt joins in this concurrence.

APPENDIX D

SUPREME COURT OF GEORGIA

Atlanta December 21, 1994

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

S94A0918. STEVE QUITGLES, d/b/a BABY DOLLS, et al. v. CITY OF COLUMBUS, GEORGIA, et al.

S94A0927. MICHAEL WELLS, d/b/a AMBER NIGHTS, et al. v. CITY OF COLUMBUS, GEORGIA, et al.

Upon consideration of the Motion to Stay Remittitur filed in these cases, it is ordered that it be hereby denied. All the Justices concur, except Fletcher and Thompson, JJ., dissent.

[Clerk's certification omitted in printing]